AN IER BRIEFING

Implications of the government's proposals on employment agencies

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More freedom for employment agencies, fewer rights for work-seekers

This paper looks at the background to proposals from the Coalition government earlier this year for a review of the law covering employment agencies, to remove some of the existing regulatory requirements. In the name of reducing the burdens on business the Coalition will reduce the existing protections for a group of vulnerable temporary agency workers. We look at the background to the new proposals, the existing level of protection for agency workers and the consequences of the proposed changes.

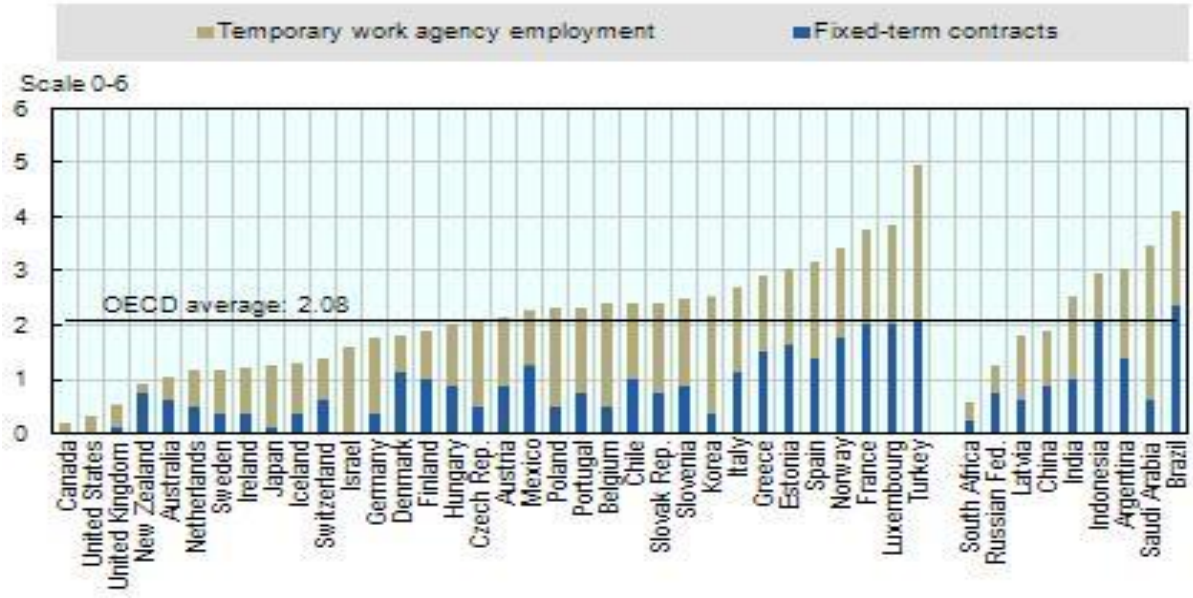
Background

In 2009 the IER publication, *Agency and migrant workers* noted that there had been a significant growth in agency working over the last decade. Agency workers were more likely to be doing short, repetitive tasks, working in clerical, semi-skilled and unskilled jobs; were more likely to be young (under the age of 25); and recently arrived migrant workers. The publication argued that despite some strengthening of the law regulating employment agencies in 2007 'the employment rights of agency workers are not well protected'. It noted that even though the law says that workers should not be charged fees to secure work through agencies, many were, particularly where they were vulnerable or new to the labour market. It submitted that methods of enforcement were weak and that the Employment Standards Agency (EAS) was insufficiently resourced to respond to the extent of abuse, with fewer than 30 inspectors for the whole country. The EAS latest annual report shows that nothing much has changed and that there remain high levels of abuse. This paper argues that particularly in the light of the economic crisis, growing unemployment and cuts in welfare entitlement what is needed is better employment protection for agency workers and strong enforcement. What the Coalition is proposing goes in the opposite direction.

Weak protection for UK workers

We already know that the UK offers one of the most flexible labour markets in the developed world, with a lower level of employment protection than almost everywhere else. Compared to the average for the OECD economies, it has a higher youth employment rate (21% compared to 16.3%) and a higher long-term unemployment rate than the average. However, it is particularly in relation to temporary and agency workers where the record is truly appalling. According to the OECD employment protection indicators (EPL), while the UK is below the average on every count, it is in relation to temporary and agency that it is at the bottom. It scores the lowest of all OECD countries in the EU, and worldwide only the USA and Canada have lower scores (see Figure below)

Figure 1: OECD Employment protection indicators – temporary and agency work 2013



Source:
http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm

The response of the Coalition government to this clear evidence of the plight of some of the most vulnerable workers differs from the IER response and, in a document issued in July 2013, the Coalition returned to the mantras of the Thatcher period, arguing that the problem is not too little employment protection but the need 'to reduce some of the burden on business' to ensure that employment law 'supports and maintains the UK's flexible labour market'. Flexibility is therefore the key, and according to the Coalition, can only be assured by making the employment agency sector even less regulated.

The consultation process

The Coalition's *Reforming the regulatory framework for the recruitment sector* response to consultation document argues that the current legislation regulating the sector is '*outdated and complicated*' and that there is a need to establish 'a new regulatory framework with minimum regulation' – surely a contradiction! The Coalition reports that it identified this need through its 'Red Tape Challenge', a suspect method whereby the government every few weeks decides on a topic and asks for views on what legislation is working and what is not. Based on this 'feedback', the government then commits itself to 'start getting rid of unnecessary red tape – freeing up business and society from the burden of excessive regulation'. Thus, despite having one of the least regulated labour markets in the developed world, the government begins the discussion by asking for recommendations for further deregulation and, in the blink of an eye, out come its proposals for reducing regulation.

Twenty questions were put out to consultation in January 2013 to which there were 286 responses. Looking at the data, micro and small businesses, along with individuals, represent the majority of respondents (68%) with only a small number of responses from trade unions, legal representatives, charities or social enterprises, or even from big business. Consequently the responses are more likely to be anti-regulation. What is surprising is that despite this, the consultation did not go all the Coalition's way, and digging into the data it is clear that there is no serious appetite for deregulation, other than the Coalition's own.

The document begins by setting out four outcomes that the Coalition says it wants to maintain/achieve. These are:

- A continuation of the restriction on charging fees to work-seekers;
- Clarity on who is responsible for paying wages for work done
- Greater opportunities for job mobility by 'reasonable' temp-to-perm fees;
- Work seekers being able to assert their rights.

These are all relatively un-contentious in and of themselves and, as might be expected, three out of every four respondents agreed with them. It was generally only sole employers who argued that they should be completely outside any regulation, able to hire labour on any terms that they set. Notably a clear majority (80% of those answering the question) argued for more than the four outcomes highlighted by the Coalition. Some stated that that agencies supplying workers to work with vulnerable people should still be obliged to make checks, rather than leaving this to the hirer, others that employment agencies should continue to obtain health and safety information from hirers before placing workers. But it looks like neither of these requirements will be in the new legislation. Some respondents expressed concern that de-regulation would lead to higher levels of exploitation of the vulnerable and that the law needed to be strengthened, including that employment agencies should be licenced. But again the Coalition is not intending to listen to that part of the consultation.

A clear majority also remained in favour of the law not allowing agencies to charge workers for work placements and the document confirms that some respondents had made the point that 'the current arrangement, where fees for recruitment services are paid by the hirer not the work-seeker, is well-established and has not hindered business' and furthermore that 'an open and free route to finding employment is vital' and that 'work-seekers should be able to choose who represents them and be not restricted to affordability'. Some went further and wanted fees to be banned in the entertainment and modelling sector, where current legislation permits their charge, and again it is unlikely that the Coalition will adopt these demands for additional regulation.

In some areas it is not clear what the Coalition intends to do. For example, in relation to transfer fees, payable to the agency by the hirer when a worker is taken on as directly employed, the document asks if the legislation could be improved. Not unexpectedly, a majority of answers were in favour, but then is it not likely that those being consulted will always support 'improvements'? Besides, this means nothing unless we know what these improvements might bring and whose position it is that will be improved.

Respondents were asked whether employment agencies should publish information about their business, and most agreed that this would provide for greater transparency; a majority did not favour compulsion.

Probably the most surprising outcome of the consultation is in relation to enforcement. There was overwhelming support (73% of those responding) for government enforcement of the law, believing that this acted as a deterrent and helped maintain standards. Respondents also (by a majority of three to four) favoured the use of prohibition notices on those who did not comply. The ability of individuals to enforce their rights at tribunal was also supported, although, as some respondents noted, the costs of lodging cases were a deterrent to most agency workers, whose low levels of pay make it unviable to take claims, and indeed this is why State enforcement is so important. There was also overwhelming support for the government to be proactive in publishing the findings of investigations carried out against agencies, with 80% of those responding agreeing with this. A majority also favoured the continued legal obligation

on employers to keep records, with 64% in support, arguing that records were necessary to demonstrate compliance. These figures too suggest little support for less regulation.

What happens next?

The Coalition says that it will introduce new legislation, which will now cover the six areas set out below:

- Ensuring that employment businesses do not withhold payment from a temporary worker – however, the document does not state how this will be done;
- Restricting employment agencies and employment businesses from charging fees to work-seekers (other than where they can at present) – no change to the current law;
- Ensuring that where more than one business works together to supply a worker to a hirer there is clarity on who is responsible for paying the worker – this leaves it to the businesses to decide and would not prevent them from making different arrangements for each job placement, if anything adding more confusion and complexity than already exists;
- Preventing employment businesses and employment agencies from penalising a temporary work-seeker from terminating or giving notice to terminate – this seems to be contradictory. If it remains the case that there should be no fees, then it should follow that there are no restrictions on workers terminating their contracts.
- Preventing employment businesses from enforcing 'unreasonable' terms on a hirer when a temporary worker takes up permanent employment – there is no definition of what might be considered 'unreasonable' and the use of terms like this certainly cannot be in line with the Coalition's supposed aim of reducing complexity in the law.
- Ensuring that agencies keep 'sufficient' records – again the use of the term 'sufficient' does not introduce clarity and makes the enforcement of any future law more complex.

But the 'sting in the tail' is at the very end of Coalition's response. It has signalled that it will reduce the already weak EAS enforcement regime. While it has said that it will focus enforcement on the most vulnerable, it has offered no additional resources to do so and in effect the outcome will be to exclude the protection of enforcement agencies from all but the most vulnerable. The EAS is more or less to be abolished with its resources moved to the National Minimum Wage team, where its focus will be limited to complaints of non-payment of the National Minimum Wage. A 'small team' will enforce all of the remaining regulations and in reality there will be no enforcement of employment agency legislation since what is left will be unable to monitor abuse. Without any effective enforcement body, whatever legislation is introduced, the Coalition must recognise that it has issued a green light to employment agencies to work as unregulated bodies. As the economic crisis forces more vulnerable workers into temporary and casual work the resources to protect their rights are to be reduced, not strengthened.